

Internal Revenue Service

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PLR-139528-09

Date: December 30, 2009

December 30, 2009

LEGEND

Taxpayer =

State A =

Date 1 =

Date 2 =

Year 1 =

a =

b =

c =

d =

e =

f =

g =

h =

i =

Dear _____ :

This letter responds to your authorized representative's letter dated August 28, 2009 requesting a ruling on the application of sections 382(g) and 382(l)(3)(C) of the Internal Revenue Code to the following transactions. The material information submitted for consideration is summarized below.

FACTS

Taxpayer is a State A corporation and the common parent of an affiliated group that files a consolidated federal income tax return. Taxpayer's group has been a loss group within the meaning of Treas. Reg. § 1.1502-91(a) since its formation in Year 1. Taxpayer currently has one class of common stock and two classes of preferred stock outstanding. Taxpayer also has several employee stock option plans ("Employee Stock Options"). During the time period described below, Taxpayer's common stock declined in value relative to the value of the Series B preferred stock.

On Date 1, Taxpayer had a shares of common stock issued and outstanding. The common stock per share market price at the close of the day was \$b. Taxpayer also had c shares of Series A preferred shares outstanding.

On the same date, Taxpayer issued d shares of Series B preferred stock to shareholders for an aggregate purchase price of \$e. The Series B preferred stock is convertible at any time into common stock at the conversion price of \$f per share, subject to adjustments on certain events. The dividend on the Series B preferred is payable for the first i years in additional shares of Series B preferred. Owners of the common stock, Series A preferred, and Series B preferred are all entitled to vote in the election of Taxpayer directors.

Within a period of time following Date 1, market conditions affected Taxpayer's business and caused the market price of its common stock to decline. Subsequent market conditions resulted in further deterioration of the common stock's market value. During this period Taxpayer also issued g additional shares of Series B preferred stock as stock dividends on the Series B preferred.

REPRESENTATIONS

The following representations have been made regarding ownership of Taxpayer's equity during the period beginning on Date 1 and ending on Date 2:

- 1) Taxpayer's only classes of stock issued and outstanding were the common stock, Series A preferred, and Series B preferred

- 2) The Employee Stock Options contain customary terms and conditions and were granted in connection with the performance of services.
- 3) The Employee Stock Options are nontransferable within the meaning of Treas. Reg. § 1.83-3(d) and did not have a readily ascertainable fair market value (within the meaning of Treas. Reg. § 1.83-7(b)) when issued.
- 4) Taxpayer did not make any distributions to its shareholders except for distributions of additional shares of Series B Preferred as pay-in-kind dividends on the Series B Preferred pursuant to its terms and the redemption of approximately h shares of the common stock.

RULING

Based solely on the information presented and representations made, for purposes of factoring out changes in proportionate ownership of Taxpayer's stock that are attributable solely to fluctuations in the relative fair market values of different classes of stock under section 382(l)(3)(C), we rule that Taxpayer may apply the following principle:

On any testing date, in determining the ownership percentage of any 5% shareholder, the value of such shareholder's stock, relative to the value of all other stock of Taxpayer, shall be considered to remain constant since the date the shareholder acquired the stock; and the value of such shareholder's stock relative to the value of all other stock of Taxpayer issued subsequent to such acquisition date shall also be considered to remain constant since that subsequent date.

CAVEATS

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed as to whether (i) Taxpayer had a testing date on any given date or (ii) Taxpayer had an ownership change on any testing date. The ruling given in this letter deals with an issue that may be addressed in subsequent published guidance. See section 11 of Rev. Proc. 2009-1, 2009-1 I.R.B. 1, 47-51 for the circumstances, including published guidance, in which the revocation or modification of a letter ruling may result.

PROCEDURAL STATEMENTS

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalties of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Gerald B. Fleming
Senior Technician Reviewer, Branch 2
(Corporate)